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(3)

No. 06-705

IN THE

Supreme Court of the United States

DOW CORNING CORPORATION,

Petitioner,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, MERRILL LYNCH, PIERCE, FENNER & SMITH, BANK OF AMERICA, N.A., BANK OF NEW YORK, JP MORGAN CHASE, DK ACQUISITION PARTNERS, L.P., HALCYON MANAGEMENT CO. LLP, HALCYON OFFSHORE MANAGEMENT CO., LLC, ANGELO, GORDON & CO., DAVIDSON KEMPNER INTERNATIONAL ADVISORS, M.H. DAVIDSON CO., INC., APPALOOSA MANAGEMENT, LLC, FRANKLIN MUTUAL ADVISORS, LLC, BEAR STEARNS & CO., INC., BEAR STEARNS GOVERNMENT SECURITIES, INC., BEAR STEARNS INVESTMENT PRODUCTS, INC., CUSTODIAL TRUST CO., NEWSTART FACTORS, INC., FARALLON CAPITAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS II, L.P., FARALLON CAPITAL INSTITUTIONAL PARTNERS III, L.P., FARALLON CAPITAL OFFSHORE INVESTORS, INC., FARALLON CAPITAL MANAGEMENT, LLC, JP MORGAN CHASE BANK, CONSOLIDATED PRESS INTERNATIONAL, THE COMMON FUND, TINICUM PARTNERS LP, CREDIT SUISSE FIRST BOSTON MANAGEMENT CORP., AMROC INVESTMENTS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO BRIEFS IN OPPOSITION

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INTRODUCTION

The briefs in opposition show not only that this Court's review is warranted, but that summary reversal may be appropriate. Respondents insist that "[petitioner's] solvency ... brought into play legal principles that arise very rarely [under] Chapter 11" of the Bankruptcy Code. Br. in Opp. of Unofficial Comm. of Unsecured Creditors *et al.* ("Creditors Opp.") 3. But neither of the two questions presented in the petition has anything to do with such principles. The first question involves the preclusive effect of a failure to appeal a confirmation order, and the second question involves entitlement to attorneys' fees.

With respect to the first question, respondents cannot, and do not, deny that three federal courts of appeals (the Fourth, Fifth, and Ninth Circuits) have squarely held that parties may not collaterally attack the legality of confirmed plans of reorganization. *See, e.g.*, *Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1143 (9th Cir. 2002); *In re Varat Enters., Inc.*, 81 F.3d 1310, 1315-17 (4th Cir. 1996); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987). Rather, respondents simply insist that they have not done so. But the Sixth Circuit expressly *rejected* respondents' challenge to the bankruptcy court's interpretation of petitioner's confirmed plan, *see* Pet. App. 12-14a, except insofar as that interpretation would violate the Bankruptcy Code, *see id.* at 14-19a. The key point, of course, is that the Sixth Circuit had no basis for reaching respondents' challenge to the plan's legality after disposing of respondents' challenge to the plan's meaning. Respondents may not wish to defend the Sixth Circuit's approach, but they cannot simply wish it away.

With respect to the second question presented, respondents oppose petitioner's request for this Court at least to hold the petition pending the forthcoming decision in *Travelers Cas. & Sur. Co. v. PG&E Co.*, 167 Fed. Appx.

593 (9th Cir.) (unpublished), *cert. granted*, 127 S. Ct. 377 (2006) (No. 05-1429) (oral argument scheduled for Jan. 16, 2007). Respondents try to distinguish *Travelers* on factual grounds, but they cannot, and do not, deny that the Sixth Circuit concededly decided the attorneys' fees issue under a legal standard different from the standard applied in the Ninth Circuit. Because this Court granted certiorari in *Travelers* to resolve the circuit conflict on this precise question, at the very least the Court should hold the petition pending the resolution of that case.

At bottom, respondents cannot, and do not, deny that each of the two questions presented in the petition involves an important issue of federal bankruptcy law (and indeed the second question is already pending before this Court). Respondents certainly cannot avoid this Court's review of the first question (either by plenary briefing on the merits or summary reversal) by simply denying that the Sixth Circuit held what it did. If anything, this case presents the first question in an unusually clean and stark manner, because the Sixth Circuit separated its analysis into two parts, the first addressed to the bankruptcy court's interpretation of the confirmed plan, *see* Pet. App. 12-14a, and the second addressed to the plan's legality as thus interpreted, *id.* at 14-19a. Accordingly, this Court should grant certiorari, and either set the case for plenary briefing or summarily reverse the decision below.

REASONS FOR GRANTING THE WRIT

I. The Finality Issue

Respondents base their argument that "there is no conflict among the circuits concerning collateral attack on a confirmed plan of reorganization," Creditors Opp. 8 (capitalization modified), on the premise that the Sixth Circuit *reversed* the bankruptcy court's interpretation of the confirmed plan wholly apart from any dispute over the plan's legality. But just the opposite is true: the Sixth Circuit expressly held that the bankruptcy court did *not*

abuse its discretion in interpreting the confirmed plan of reorganization except insofar as the plan, as thus interpreted, would violate the law. *See* Pet. App. 12-14a.

Because respondents' substantive position is based on a distortion of the relevant procedural history, it is worth briefly recapping that history. Respondents assert over and over again that the bankruptcy court "sustained" their objection to the plan originally proposed by Dow Corning. Creditors Opp. 2, 4, 5, 6, 10 (emphasis omitted). But that assertion is only partially true. The bankruptcy court sustained respondents' objection to the extent they claimed that they were entitled to pendency interest at contractual (as opposed to statutory) rates, but overruled respondents' objection to the extent they claimed that they were entitled to pendency interest at the contractual default (as opposed to base) rates. In particular, the bankruptcy court's 1999 order confirming the plan provided as follows:

> [T]he Court deems the Plan to have been verbally amended to provide that pendency interest will be paid to Class 4 creditors *in accordance with the terms of the parties' contracts.* In determining the applicable rate, however, *no effect is to be given to contractual provisions which purport to define as a default the filing of a voluntary petition for bankruptcy relief. Cf., e.g.*, 11 U.S.C. §§ 363(l), 365(b)(2), 365(e)(1)(B) and 541(c)(1)(B) (stating in various contexts that such a provision is unenforceable); *see generally In re James Cable Partners, L.P.*, 154 B.R. 813, 816 (M.D. Ga. 1993), *aff'd*, 27 F.3d 534 (11th Cir. 1994) (referring to "a basic bankruptcy policy that abhors the operation of so-called 'ipso facto' clauses[,] ... which trigger a default ... upon the happenstance of bankruptcy" (citation omitted)); *In re Chedick*, No. 95-01096, 1996

> WL 762329, at *3 (Bankr. D.D.C. Mar. 22, 1996) ("The 5% fee due when a bankruptcy petition is filed is void as a matter of public policy."); *In re Hutchins*, 99 B.R. 56, 57 (Bankr. D. Colo. 1989) ("Bankruptcy default clauses are not favored and are generally unenforceable under the Bankruptcy Code."); *In re Perry*, 25 B.R. 817, 820 (Bankr. D. Md. 1982) (*en banc*; *per curiam*) (Enforcement of "bankruptcy clauses ... would result in forfeitures contrary to the spirit of the Code, a result which courts of equity strain to avoid.").

In re Dow Corning Corp., 244 B.R. 678, 696 (Bankr. E.D. Mich. 1999) (emphasis added). At the very least, the foregoing passage should have put respondents on notice that they could not assume that "pendency interest ... in accordance with the terms of the parties' contracts," *id.*, meant interest at the contractual default (as opposed to base) rates. But respondents neither appealed nor even sought clarification of that ruling.

Rather, respondents waited until petitioner subsequently objected to their proofs of claim to the extent they sought pendency interest at the contractual default rates, and then moved for summary judgment. In 2001, the bankruptcy court (the same court that had confirmed the plan just over a year earlier) denied respondents' motion. As the court explained, "a straightforward application of the plan terms would mean that [respondents] are entitled only to the *base* contract rate of interest." Pet. App. 58a (emphasis added); *see also id.* at 60a ("[T]he Court does not see how one can reconcile [a] demand for default-rate interest with the plan's provision for application of the interest rate in effect when [petitioner] filed its [Chapter 11] petition.").

Although respondents now characterize the bankruptcy court's 2001 decision interpreting the

confirmed plan as "inexplicabl[e]," "astonishing[]," and "completely at odds with its earlier ruling," Creditors Opp. 2, 5, 6, the Sixth Circuit did not see things that way. Rather, the Sixth Circuit expressly held that the bankruptcy court did *not* abuse its discretion in interpreting the confirmed plan, except insofar as the plan, as thus interpreted, would violate the Bankruptcy Code. *See* Pet. App. 12-14a.

Indeed, the Sixth Circuit separated its analysis of the "[m]erits" of this case into two distinct parts. *First*, in subsection 2.a, the Sixth Circuit addressed respondents' argument that the bankruptcy court "incorrectly interpret[ed] its prior language [in the confirmed plan] and thus effectively modif[ied] the plan." *Id.* at 11a. *Second*, in subsection 2.b, the Sixth Circuit addressed respondents' argument that the bankruptcy court's "interpretation of the plan caused it to violate § 1129(b)'s fair-and-equitable standard." *Id.* at 11-12a.

The Sixth Circuit squarely rejected respondents' first argument, regarding plan interpretation. As the court explained, "[respondents] argue that the language in the bankruptcy court's 1999 decision can *only* be interpreted as providing for pendency interest at the contracts' default rates." *Id.* at 12a (emphasis added). Although the Sixth Circuit "disagree[d] with the bankruptcy court's conclusion that the plan was unambiguous" on this point, the appellate court held that "the bankruptcy court's ultimate interpretation of that language did not constitute an abuse of discretion." *Id.* at 13-14a; *see also id.* at 14a ("[Respondents] have not met the extremely difficult burden of demonstrating on appeal that the bankruptcy court incorrectly interpreted its own prior language or intent."); *id.* ("[T]he bankruptcy court cannot be said to have abused its discretion by interpreting its own words incorrectly.").

Under 11 U.S.C. § 1141(a), which provides that a confirmed plan of reorganization is final and binding, that

should have been the end of the matter—and would have been the end of the matter in the Fourth, Fifth, and Ninth Circuits. *See, e.g.*, *Stratosphere*, 298 F.3d at 1143; *Varat*, 81 F.3d at 1315-17; *Republic Supply*, 815 F.2d at 1050. The Sixth Circuit, however, proceeded to address respondents' alternative argument that the plan, if interpreted to provide for pendency interest at the contractual base rates, would violate the Bankruptcy Code. *See* Pet. App. 14a ("Although the bankruptcy court did not abuse its discretion by interpreting the plan as requiring the payment of pendency interest at a non-default, fixed rate, the bankruptcy court still may have done so if it construed the plan in such a way as to cause it to violate § 1129(b)'s fair and equitable requirement."); *id.* ("[Respondents] argue[] that the bankruptcy court abused its discretion by interpreting the plan in such a way as to produce a result that violates [§ 1129(b)] of the Bankruptcy Code."). And the Sixth Circuit proceeded to grant respondents relief based on that statutory argument, holding that the confirmed plan (as otherwise reasonably interpreted by the bankruptcy court per subsection 2.a) might nonetheless violate § 1129(b). The Sixth Circuit therefore reversed the district court's decision upholding the bankruptcy court's decision, and remanded the case to allow respondents to prove that plan violated that provision. *See* Pet. App. 19a, 31a.

By proceeding to address respondents' statutory challenge to the confirmed plan *after* concluding that the bankruptcy court (independent of that challenge) had reasonably interpreted the plan, the Sixth Circuit unambiguously "permit[ed] collateral attack upon a final confirmation order." Creditors Opp. 8. Respondents purport to distinguish the cases cited by petitioner on the ground that in those cases "the party bringing a true collateral attack failed to assert an objection to confirmation of a plan," whereas here respondents not only objected to the plan, but "*[t]he Bankruptcy Court ruled in [their] favor.*" *Id.* at 9 (emphasis added). As

noted above, the latter assertion is misleading at best. The bankruptcy court ruled in respondents' favor only on the (now irrelevant) issue of statutory vs. contractual interest rates, but ruled against them on the distinct issue (presented here) of base vs. default contractual interest rates. *Dow Corning*, 244 B.R. at 696. Although respondents have argued at every stage of this litigation that the confirmed plan "can only be interpreted as providing for pendency interest at the contracts' default rates," Pet. App. 12a, they have *lost* on that critical issue at every stage, including the Sixth Circuit, *see id.* at 13-14a, 47-49a, 58-59a.

What respondents are doing, in other words, is defending the Sixth Circuit's decision to reach their statutory challenge to the confirmed plan, *see id.* at 14-19a (subsection 2.b), by simply denying the Sixth Circuit's antecedent decision with respect to plan interpretation, *see id.* at 12-14a (subsection 2.a). But it is precisely because respondents lost on the issue of plan interpretation (independent of their challenge to plan legality) that this case squarely presents a "collateral attack upon a final confirmation order." Creditors Opp. 8. Respondents cannot avoid the collateral nature of their attack by falsely implying that they won below on the threshold issue of plan interpretation. *See id.* at 9-10. Under the confirmed plan, as interpreted by the bankruptcy court and affirmed by the Sixth Circuit (independent of respondents' statutory challenge), respondents *lost* on the issue of base vs. default contractual interest rates. Accordingly, respondents should have appealed the confirmation order (or at least, to the extent they thought the plan was ambiguous, moved to clear up any such ambiguity). *In re Harvey*, 213 F.3d 318, 322 (7th Cir. 2000); *In re Szostek*, 886 F.2d 1405, 1413-14 (3d Cir. 1989); *In re Haynes*, 107 B.R. 83, 86 (Bankr. E.D. Va. 1989). Because respondents failed to object to the confirmed plan to the extent that it provided for pendency interest at base (as opposed to default)

contractual rates, this case is indistinguishable from the cases cited by petitioner, all of which refused to entertain collateral attacks on the legality of a confirmed and final reorganization plan. *See Stratosphere*, 298 F.3d at 1143; *Varat*, 81 F.3d at 1315-17; *Republic Supply*, 815 F.2d at 1050.

By allowing respondents to pursue such a collateral attack (regardless of whether they ultimately prevail),[1] the Sixth Circuit has destabilized the law and undermined core principles of finality. Given that the whole point of bankruptcy reorganization is to give the debtor a fresh start, *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934), it is imperative that both a debtor and its creditors understand the extent and scope of the debtor's liabilities under a confirmed and final plan of reorganization. Needless to say, such finality (and the stability and predictability it fosters) will vanish if a plan can always be challenged as unlawful. It is hard to imagine an issue of greater importance to the effective administration of the Nation's bankruptcy laws. Accordingly, this Court should either set this case for plenary briefing, or summarily reverse the decision below.

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[1] Respondents note in passing that the decision below is "interlocutory," Creditors Opp. 2, which is obviously true in the sense that the Sixth Circuit remanded for a determination whether pendency interest at the base (as opposed to default) contractual rates would satisfy the "fair and equitable" standard of 11 U.S.C. § 1129(b), *see* Pet. App. 19a. But petitioner is challenging the Sixth Circuit's decision even to reach that issue as a matter of law, so the challenge is ripe for review regardless of what happens on remand. Indeed, many of this Court's cases have arisen in precisely this procedural posture, where the Court of Appeals has established the relevant legal standard and remanded for application of that standard. *See, e.g., Randall v. Sorrell*, 126 S. Ct. 2479 (2006); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005); *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999).

II. The Attorneys' Fees Issue

Respondents urge this Court not even to hold this petition pending the resolution of *Travelers*, which involves the attorneys' fees issue set forth in the second question presented, on the ground that "[t]he facts in the present case are materially different from the facts in the *Travelers* case." Creditors Opp. 11. Essentially, respondents argue that the claims at issue here are fundamentally contractual in nature, rather than based on the Bankruptcy Code, *see id.*—which is an odd argument for them to make, given that they obtained relief from the Sixth Circuit based on their interpretation of § 1129(b) of the Bankruptcy Code.

In any event, the Sixth Circuit certainly did not think that respondents' arguments were independent of the Bankruptcy Code, and did not purport to distinguish the Ninth Circuit precedents cited by petitioner on that basis. To the contrary, the Sixth Circuit expressly "decline[d] to follow the series of Ninth Circuit cases relied upon by [petitioner], which limit the recovery of attorneys' fees, costs and expenses to those incurred in enforcing the contract." Pet. App. 28a; *see also id.* at 29a ("[W]e recognize that the Ninth Circuit has squarely held that, even if provided for by contractual provisions valid under state law, creditors may never be awarded attorneys' fees expended litigating issues solely of federal bankruptcy law.") (citing, *inter alia*, *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d 1039, 1040-42 (9th Cir. 2003)); *id.* ("We do not find the reasoning of *Thrifty Oil* persuasive."). Because the Sixth Circuit did not distinguish the Ninth Circuit cases on the facts, respondents' ostensible factual distinctions miss the point, and a hold for *Travelers* is clearly warranted.[2]

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[2] Respondent Bank of New York (BNY) makes a related argument against a hold. According to BNY, the Sixth Circuit

Respondents' argument that a hold is unwarranted because "the Court of Appeals' decision is interlocutory," Creditors Opp. 11, is equally unpersuasive. While it is true that the Sixth Circuit remanded the case "for proper consideration of exactly what fee arrangements are permitted under the relevant state laws and under each contract at issue," Pet. App. 30a, it is also true that the Sixth Circuit squarely decided the legal issue presented in *Travelers*, and (as noted above, *see supra* n.1) a remand is no bar to this Court's review of an important legal question decided by the Court of Appeals. Indeed, respondents' request for "the proceedings in the lower courts ... to proceed forthwith" on the attorneys' fees issue, Creditors Opp. 12, makes little sense, since the law governing such proceedings will not be settled until this Court renders its decision in *Travelers*. What respondents think would be gained by a remand under such circumstances, other than evading this Court's review, is a mystery.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, this Court should grant the petition for writ of certiorari and either set the case for briefing on the merits or summarily reverse the decision below.

"could have" resolved the attorneys' fees issue in BNY's favor without implicating the circuit conflict in *Travelers*, but did not do so. *See* BNY Opp. 1, 8, 10. The short answer to that argument is that this Court reviews actual, not hypothetical, rulings. Because the Sixth Circuit actually resolved the attorneys' fees issue in favor of *all* respondents (including BNY) on the basis of the legal issue presented in *Travelers*, a hold is warranted for all respondents. In any event, as a practical matter, a single petition cannot be held with respect to some respondents but not others, so it is not clear what BNY even hopes to accomplish with this argument.

Respectfully submitted,

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